

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No 383 of 1992

in

SPECIAL CIVIL APPLICATION No 5343 of 1982

with

CIVIL APPLICATION No 1817 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE J.N.BHATT

and

Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES
2. To be referred to the Reporter or not? : YES
3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
5. Whether it is to be circulated to the Civil Judge? : NO

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STATE OF GUJARAT

Versus

KAILASHBEN NARANDAS PRAJAPATI

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Appearance:

MR HN SOMPURA, AGP, FOR M/S MG DOSHIT & CO for Appellants

MR SHALIN N MEHTA FOR MR GIRISH PATEL for Respondent No. 1

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CORAM : MR.JUSTICE J.N.BHATT

and

MR.JUSTICE D.P.BUCH

Date of decision: 14/11/2000

ORAL JUDGEMENT

(Per : MR.JUSTICE J.N.BHATT)

The appellants, who are, original respondents have assailed the judgment and order recorded in Special Civil Application No.5343 of 1992 on February 25, 1992, by the learned single Judge, in this Letters Patent Appeal, under clause 15 of the Letters Patent, inter alia, contending that the impugned order, whereby, the respondent-original-petitioner came to be reinstated in service with full backwages and all benefits, quashing the order dated 4.9.82, as at Annexure D.

The original petitioner, was working as Clerk-cum-Typist in the office of the Chief Architect, Gujarat State, Ahmedabad. Pursuant to the office order No.320 of 1979 dated 24.12.1979, the petitioner came to be appointed as Junior Clerk-cum-Typist, Class III only for 29 days in the pay scale of Rs.260-400, in Narmada Cell on temporary basis and on leave vacancy of one Smt. D.D.Shah, on the terms and conditions mentioned in the order, which is placed as at Annexure A to the petition. She continued till the impugned order dated 4.9.82 came to be passed. Different orders of appointment are, also, produced on record. As we have seen, the first order was passed on 24.12.1979. Thereafter, second appointment order was passed on 1.12.80, which is produced at Annexure B to the petition, which also, clearly, stipulates that the appointment was temporary and also condition that her services shall stand terminated on 1.12.80, upon regular appointment after select list is prepared by the Collector concerned. One of the orders, clearly, stipulates that her services shall be terminated at any time without any notice. Third order of appointment is produced at Annexure C to the writ petition, whereby, the petitioner came to be appointed on the same post, purely, on temporary basis pursuant to the letter dated 1.12.80 of the Chief Architect. Since the appointment of the petitioner was on a leave vacancy, purely on temporary basis, the impugned order came to be recorded by the office order No.82 of 1982, dated 4.9.82, whereby, her services came to be terminated with immediate effect before office hours on that day. Thereafter, she made representations.

The petitioner, inter alia, contended that her

appointment was made after her name was called from the Employment Exchange and she was working on a temporary substantive post and, therefore, she was entitled to be regularised. She relied on the provisions of rule 33(1)(b) of the Bombay Civil Service Rules (BCSR). It was, therefore, the case of the petitioner that though she was working on temporary basis, in absence of any compliance of the said rule provision, she is entitled to be reinstated with full backwages. The learned single Judge found favour with this plea and directed the appellants, original respondents, to reinstate her in service and to give backwages from the date of termination, like that 4.9.82.

The appellants herein, original respondents, appeared and resisted the claim made in the petition, contending that the rule provision of rule 33(1)(b) of BCSR would not be attracted in the facts and circumstances of the present case, since she was appointed only in the leave vacancy of one Clerk Mrs.D.D.Shah and purely on temporary basis until regularly selected person would be available.

We have heard the learned advocates appearing for the parties. We have, threadbare, analysed and examined the relevant material on record. It is explicit from the very first order that the Chief Architect of Gujarat State, Ahmedabad, calling name from the Employment Exchange appointed her by letter dated 11.12.79 on the post of Junior Clerk-cum-Typist, which had fallen vacant on quite temporary basis. It is also very clear from the appointment order that the services shall be terminated at any time without any notice. Subsequent orders also, clearly, go to show that her appointment was quite ad-hoc, purely temporary and in leave vacancy. It is also indisputably established that the petitioner was, again, appointed by a separate order on the same status in leave vacancy as she had proceeded on maternity leave in September, 1980.

The petitioner had made representation to the Senior Architect, original respondent No.4. She had also filed application before the Gujarat Civil Services Tribunal on 15.11.81 seeking relief of reinstatement and full backwages. The Tribunal directed the Authority to reinstate her on 8.1.82.

Finally, her services came to be terminated by the impugned order dated 4.9.82 and on having come to know the order, she approached the Tribunal with a request to stay the impugned order of termination passed by the authority. As the petitioner's services were already

terminated on 4.9.82, and she had given application for regularisation of services on 7.8.82, after withdrawing the said application, she filed the aforesaid writ petition, which came to be decided in her favour and which is challenged in this Letters Patent Appeal.

Following aspects have emerged from record which have remained incontrovertible:

1. The petitioner was appointed from the very beginning on leave vacancy of one Mrs.D.D.Shah, on temporary and ad-hoc basis.
2. The appointment was not in terms of the recruitment rules. Her name was only called from the Employment Exchange and without observing any prescribed rule provisions or procedure, she came to be appointed in leave vacancy and thereafter she continued periodically under different orders and finally her services came to be terminated as the competent appointing authority appointed one regularly selected person after observing the recruitment rules.
3. It is explicit from the impugned order at Annexure D that the Chief Architect, Gujarat State, Ahmedabad, had appointed a regularly selected candidate on the said post. The selection procedure was in terms of the Central recruitment scheme through the District Collector and, as such, services of the petitioner, upon appointment of a regularly selected person, simultaneously came to be terminated on 4.9.92. It is an admitted fact that regularly selected and newly appointed candidate has been working on the said post, since termination of the petitioner till the date of decision of the petition.

The question which requires adjudication, in this appeal, is as to whether the impugned order of the learned single Judge quashing the termination order and granting full backwages from the date of termination, in the light of the service status of the original petitioner and celebrated principles of service jurisprudence, could be upheld or is vulnerable. With due respect, in our opinion, the impugned order of the learned single Judge is not only unjust and unreasonable but illegal as well.

The right to civil post, obviously, would accrue to a person on appointment to a civil post after the regular

appointment following the recruitment rules is made. Leave vacancy, by no stretch of imagination could be characterised as a successful launching pad for generation of a right to civil post under the service jurisprudence. In absence of any regularly appointed person, either on account of leave or any other permissible absence, another person is appointed specifically highlighting that the appointment is for a temporary period in leave vacancy, how could there be a right to hold the civil post permanently ? Simply because on account of certain contingencies, as in the present case, an incumbent continues for longer period on temporary ad-hoc basis or in leave vacancy without undergoing regular selection and recruitment process in terms of the relevant service rules, the incumbent could not be said to be having any right to hold the post. Merely because in one of the orders, it is stated that it is temporary, the plea of invocation of the provisions of rule 33(1)(b) of the BCSR could not be, successfully, availed of.

The reliance placed on the decision of a Division Bench of this Court in Sub Divisional Soil Conservation Officer v. M.M.Saiyed, 31(1) GLR 495, by the learned counsel appearing for the original petitioner is of no assistance to the petitioner. The proposition laid down in the said decision is that the services of a temporary Government servant could not be intercepted, without giving notice with requisite period or in lieu thereof, salary. The entire scheme evolved in the rule provision categorically expounds that in order to avail the benefit of the same, there must be a temporary Government service. In other words, if a person is appointed temporarily also on a substantive post, by a regular selection or after observing the recruitment rules, even if the status may be of temporary Government servant, the services of such a servant cannot be terminated without giving notice in writing by the appointing authority. If the period of service exceeded one year, the period of such a notice has to be one month and for less than one year, notice period shall be one week.

Rule provision prescribed in rule 33(1)(b) of the BCSR, obviously, would not apply to the appointments which are purely in leave vacancy, ad-hoc for a limited period or on purely time limit temporary services. There is a logic and rational behind it. The appointments which are not emanated from the prescribed procedure under the recruitment rules or which are purely temporary and which could be terminated forthwith without any notice, the appointments being simply contractual appointments, the

servants would not be entitled to fall back or seek protection of the said rule provisions. The interpretation which the learned single Judge has made, in the light of the facts and circumstances of the present case, with due respect, is not in consonance with the letter and spirit of the said rule provision and the latest principles of law expounded and propounded in various judicial pronouncements. We would not like to burden this judgment by referring various such judgments. However, the view which we are inclined to take, at this juncture, is very much reinforced by the decision of the Hon'ble Supreme Court in State of Gujarat v. P.J.Kampavat, AIR 1992 SC 1685.

The Hon'ble Supreme Court in P.Ravindran v. Union Territory of Pondicherry, (1997)1 SCC 350 has made pertinent exposition of relevant law in this regard which is very important to be noted. It has been held that the process of recruitment through the Commission, as envisaged under the Constitution cannot be bypassed by issuing direction for regularisation of services of the adhoc persons, who had come to the service through backdoor entry. It is further observed that the Supreme Court in catena of decisions has deprecated the practice of regularisation. Similarly in J & K Public Service Commission v. Dr.Narinder Mohan, (1994)2 SCC 630, it has been observed that the Court cannot adopt hybrid process of direction to regularise the services bypassing the process of selection. In the present case, the recruitment to the post in question is to be made under the central recruitment rules by the central recruitment scheme which is entrusted to the District Collector.

In the light of the facts of the present case, it cannot be said that the petitioner has acquired any right to hold the civil post though she was appointed in leave vacancy and also with a stipulation with the appointment order that her services could be terminated at any time without notice. It is not disputed that the initial appointment was in leave vacancy of the regular incumbent of the post on which she was appointed and the termination order followed when regularly selected person by central recruitment authority under the Central Recruitment Rules of the State came to be appointed. Under the service jurisprudence, status of the writ petitioner on the post would be a contractual servant and not a statutory or regularly appointed servant of the Government. The entire gist and genesis of the various orders which we have read in course of the submissions before us, evidently, go to show that the writ-petitioner, from the inception continue to hold the

post of Clerk-cum-Typist, which had, as such fallen vacant on account of leave of one Mrs.D.D.Shah. The initial appointment was, therefore, was for 29 days. Since the leave vacancy continued and since the name was called from the Employment Exchange, the appointing authority thought it fit to continue her for a further period until a duly selected incumbent under the Central Recruitment Rules by the Central Recruitment Authority, like that Collector of the District. In these circumstances, unfortunately, we have not been able to persuade ourselves to agree with the proposition propounded by the learned single Judge in the impugned order. There was, as such, no any relation between the petitioner and the appointing authority, as contemplated by the provisions of rule 33(1)(b) of the BCSR. This aspect appears to have been lost sight of while rendering the impugned judgment by the learned single Judge and since the impugned judgment directing reinstatement after 18 years without any work with full backwages and all other incidental benefits to the writ-petitioner, would be totally devoid of the spirit and object of the said rule provision and, therefore, the order being not in legal form and shape, we, in exercise of our powers under clause 15 of the Letters Patent, have to put in correct legal shape by quashing the impugned order.

Before parting, it may also be stated that the writ-petitioner since the date of termination order dated 4.9.82 has not worked on the said post and on the other hand, the newly and duly recruited incumbent by the Central Recruitment authority under the Central Recruitment rules of the District has been appointed on the said post and has continued to work. Again, the person who is enjoying the said post and who has a right to hold the post on account of his appointment being regular as per the Recruitment Rules, unlike, the writ petitioner, has not been impleaded as party in the writ petition nor in the Letters Patent Appeal before us. Apart from any other thing, if the Appeal is dismissed, the situation would emerge that the writ petitioner shall be entitled to full backwages for the last 18 years without having done any work on the said post and the person who has done the work continuously in the corresponding period, who is allowed to hold the post and who was appointed regularly by the Competent authority under the relevant recruitment rules will have to be thrown out in his absence. Of course, this last point is not the least. The facts of the present case, clearly, indicate that the provisions of rule 33(1)(b) of the BCSR are not attracted to the facts of the present case. Therefore, the termination order recorded by the

competent authority, upon appointment of a regularly selected new person is quite legal and justified requiring no interference in a writ petition and, that too, in exercise of the extraordinary, plenary, equitable, discretionary powers of the writ court. We have, therefore, no hesitation in finding that the impugned order of the learned single Judge suffers from the vice of illegality and, therefore, we are left with no alternative, but to quash the same and hold that the impugned termination order is justified and is not vulnerable.

In the result, the appeal is allowed. The impugned order of the learned single Judge is quashed and set aside. No order as to costs.

(J.N.Bhatt, J.)

(D.P.Buch, J.)

(vjn)